ASCENTIVE, LLC v. GOOGLE, INC. Doc. 12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASCENTIVE, LLC, Plaintiff, v. GOOGLE, INC., Defendant.	Civil Action No. 2:09-cv-02871

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

By: [signature]

Abbe F. Fletman, Esq.
Jordan A. LaVine, Esq.
Alexis Arena, Esq.
FLASTER/GREENBERG P.C.
1600 John F. Kennedy Blvd., Suite 200
Philadelphia, PA 19103
Attorneys for plaintiff Ascentive, LLC

Dated: July 24, 2009

Dockets.Justia.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

FACTS 4

A. GOOGLE'S REFUSAL TO CEASE DISPLAYING ASCENTIVE'S TRADEMARKS IN THE TEXT OF GOOGLE ADVERTISEMENTS FOR ASCENTIVE'S COMPETITORS. 4

B. GOOGLE'S REFUSAL TO CEASE SELLING ASCENTIVE'S REGISTERED TRADEMARKS TO ASCENTIVE'S COMPETITORS AS KEYWORDS. 5

C. GOOGLE BREACHES ITS CONTRACT WITH ASCENTIVE BY BANNING ASCENTIVE WITHOUT JUSTIFICATION OR EXPLANATION. 7

D. ASCENTIVE IS SUFFERING IRREPARABLE HARM AS A RESULT OF GOOGLE'S WRONGFUL CONDUCT. 8

ARGUMENT 10

A. ASCENTIVE IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS 10

1. Google's Willfully Misleading Search Results and Misuse of Ascentive's Trademarks Are Likely to Confuse Consumers 10

(a) The Evidence Demonstrates Consumer Confusion in the Form of Diverted Internet Traffic. 12

(b) Despite Holdings that Google's Use of Trademarks in Ad Text Causes Customer Confusion, Google Continues to Include Ascentive's Trademarks in Ad Text in Breach of its Own Policies and Contract 14

(c) Courts Already Have Held that the Use of Trademarks as Keywords Causes a Likelihood of Confusion, But Google Continues to Encourage its Advertisers to Use Ascentive's Trademarks as Keywords. 16

(d) Courts Have Broadly Defined Unfair Competition and False Designation of Origin to Include Google's Deceptive Ban of Ascentive, But Google Continues Its Unjustified Ban of Ascentive. 18

2. Google's Intentional Interference with Ascentive's Prospective Contractual Relationships and Breach of its Contract with Ascentive 20

B. ASCENTIVE IS SUFFERING IRREPARABLE HARM 21

C. THE PUBLIC INTEREST AND BALANCE OF HARDSHIPS STRONGLY FAVOR AN INJUNCTION. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

800-JR Cigar, Inc. v. GoTo.com, Inc.,
437 F.Supp.2d 273 (D.N.J. 2006) 13, 14, 16, 17

A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.,
237 F.3d 198 (3d Cir. 2000) 11

Am. Greeting Corp. v. Dan-Dee Imports, Inc.,
807 F.2d 1136 (3d Cir. 1986) 10

American Telephone and Telegraph Company v. Winback and Conserve Program, Inc.,
42 F.3d 1421 (3d Cir. 1994) 19

Ames Publishing Co. v. Walker-Davis Publications, Inc.,
372 F. Supp. 1 (E.D.Pa. 1974) 19

Australian Gold, Inc., v. Hatfield,
436 F.3d 1228 (10th Cir. 2006) 13, 17

Board of Directors of Sapphire Bay Condominiums West v. Simpson,
No. 04-3690, 2005 WL 1006922 (3d Cir. May 2, 2005) 23

Checkpoint Sys., Inc., v. Check Point Software Techs., Inc.,
269 F.3d 270 (3d Cir. 2001) 11, 12, 13

Edina Realty, Inc. v TheMLSOnline.com,
No. 04cv4371, 2006 WL 737064 (D. Minn. Mar. 20, 2006) 14

Finance Express, LLC, v. Nowcom Corp.,
564 F.Supp.2d 1160 (C.D. Cal. 2008) 16, 17

Frisch's Restaurants, Inc., v. Elby's Big Boy of Steubenville, Inc.,
670 F.2d 642 (6th Cir. 1982) 19

GEICO v. Google, Inc.,
No. 1:04cv507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005) 11, 14

Interpace Corp. v. Lapp,
721 F.2d 460 (3d Cir. 1983) 12, 15

Kos Pharmaceuticals, Inc. v. Andrx Corp.,
369 F.3d 700 (3d Cir. 2004) 10, 11

Opticians Assoc. of America v. Independent Opticians of America,
920 F.2d 187 (3d Cir. 1990) 11, 15, 22, 23

P. Lorillard Co. v. FTC,
186 F.2d 52 (4th Cir. 1951) 19

Playboy Enters. v. Welles,
7 F.Supp.2d 1098 (S.D.Cal. 1998) 17

RescueCom Corp. v. Google, Inc.,
562 F.3d 123 (2d Cir. 2009) 11, 16, 18

S&R Corp. v. Jiffy Lube Int'l,
968 F.2d 371 (3d Cir. 1992) 21, 22

SK&F, Co. v. Premo Pharm. Laboratories,
625 F.2d 1055 (3d Cir. 1980) 23

Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.,
982 F.2d 633 (1st Cir. 1992) 22

Soilworks, LLC, v. Midwest Industrial Supply, Inc.,
575 F.Supp.2d 1118 (D. Ariz. 2008) 17

Standard Terry Mills, Inc. v. Shen Mfg. Co.,
803 F.2d 778 (3d Cir. 1986) 11

Times Mirror Magazines, Inc. v. Las Vegas Sports News, LLC,
212 F.3d 157 (3d Cir. 2000) 22

U-Haul Intern., Inc., v. Jartran, Inc.,
522 F.Supp. 1238 (D.C. Ariz. 1981) 19

United States Jaycees v. Philadelphia Jaycees,
639 F.2d 134 (3d Cir. 1981) 15

Vuitton v. White,
945 F.2d 569 (3d Cir. 1991) 22

STATE CASES

The York Group, Inc., v. Yorktowne Caskets,
924 A.2d 1234, 1245 (Pa. Super. 2007) 21

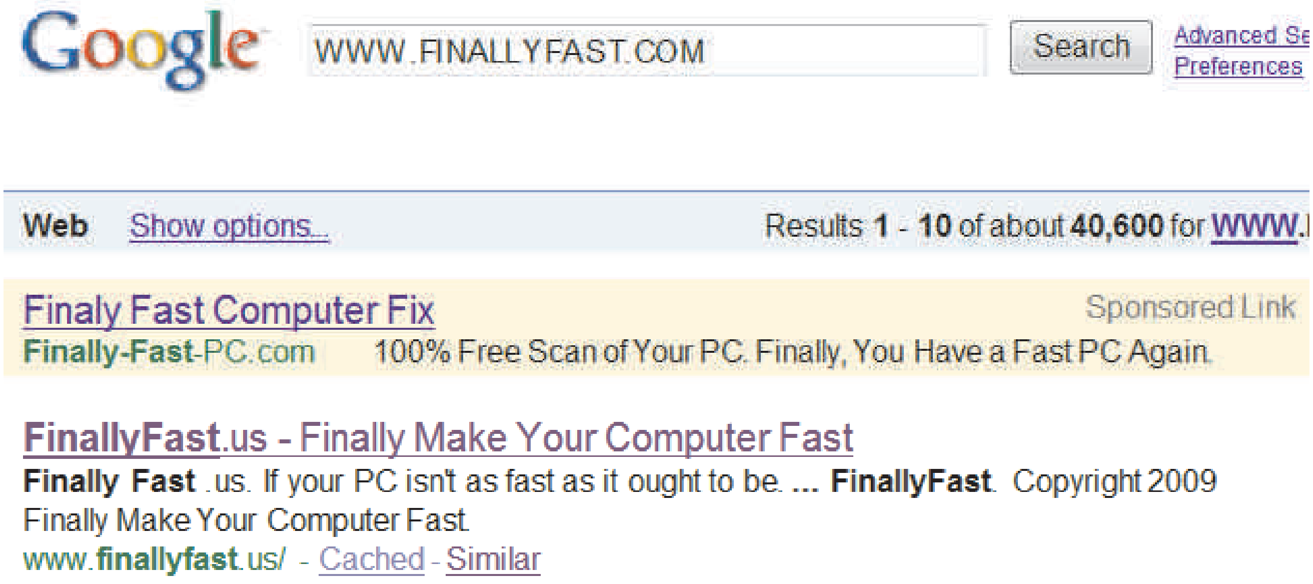
FEDERAL STATUTES

15 U.S.C. § 1114 11

15 U.S.C. § 1125(a) 11

Plaintiff, Ascentive, LLC ("Ascentive"), seeks a preliminary injunction to stop defendant Google, Inc. ("Google"), from using Ascentive's trademarks to sell competing computer software and from shutting Ascentive out of Google's search results and advertising programs.

Evidence of the urgent need for preliminary relief in this matter is displayed by searching for Ascentive's products using Google's search engine, located at www.google.com. Ascentive sells computer software products that can be purchased and downloaded from websites including Ascentive's website www.finallyfast.com, where Ascentive's "FinallyFast" computer software provides consumers with a "Free PC Scan" that identifies ways to improve computer performance. (Schran Decl., ¶¶ 2, 8). Ascentive spends millions of dollars in television ads for its FinallyFast software, which instruct consumers that they can download the software advertised by locating the website www.finallyfast.com online. (*Id.* at ¶¶ 13-15). Internet users who search for "www.finallyfast.com" through Google's search engine[1] would not find a single Ascentive product. Instead, they would find search results showing competitors who use names confusingly similar to Ascentive's FinallyFast trademark, including the following:


Google
WWW.FINALLYFAST.COM
Search
Advanced Se
Preferences
Web
Show options...
Results 1 - 10 of about 40,600 for WWW.
Finaly Fast Computer Fix
Sponsored Link
Finally-Fast-PC.com
100% Free Scan of Your PC. Finally, You Have a Fast PC Again.
FinallyFast.us - Finally Make Your Computer Fast
Finally Fast .us. If your PC isn't as fast as it ought to be. ... FinallyFast. Copyright 2009 Finally Make Your Computer Fast.
www.finallyfast.us/ - Cached - Similar

(Images excerpted from July 15, 2009 Search Results, attached to Arena Declaration as Ex. 1).

[1] More than 78 percent of internet searches in the United States were performed using Google's search engine. "Google's name now means search to most users." (Arena Decl., Ex. 2).

The prospective purchaser seeking Ascentive's FinallyFast software is likely to be confused and believe that Ascentive operates or is affiliated with one of these nonaffiliated competing websites and that they contain Ascentive's FinallyFast software when they do not.

Selecting either link leads the purchaser to websites that display Ascentive's FinallyFast trademark in connection with computer software advertisements. (Arena Decl., Ex. 1). The FinallyFast.us website proclaims that it offers the FinallyFast software "Seen on TV" and advertises the same "Free PC Scan" offered by Ascentive. (*Id.*) When the purchaser clicks on the "Free PC Scan" invitation, he or she is immediately prompted to download software that is not Ascentive software:

FinallyFast
.us
AS SEEN ON TV
If your PC isn't as fast as it ought to be.
File Download - Security Warning
Do you want to run or save this file?
Name: RegDefense.exe
Type: Application, 1.92MB
From: www.regdefense.com
Run
Save
Cancel
While files from the Internet can be useful, this file type can potentially harm your computer. If you do not trust the source, do not run or save this software. What's the risk?
Home
Finally Make Your Compute
The #1 Choice is Perfect Optimizer
- Looking for a program which can boost your PC
- Sick of waiting for programs to load or respond?
Perhaps it is time that you invested a bit of money in the upkeep and protection of your PC, rather than continuously forking out for expensive repairs and maintenance! As you are about to see, the Perfect Optimizer program is literally the best software that money can buy, when it comes to achieving a strong, clean, and fast Windows PC.
Perfect Optimizer
FREE PC SCAN

Instead, the software at FinallyFast.us and Finally-Fast-PC.com has intentionally been mislabeled by the website owners and Google to make them believe it is Ascentive's software.[2] Google profits from this mislabeling because advertisers like Finally-Fast-PC.com compensate

[2] Finally-Fast-PC.com is listed in the highlighted "Sponsored Link" section of Google's search results above because it is a Google advertiser that has paid Google to appear in the Sponsored Links following searches for "www.finallyfast.com." Although FinallyFast.us is not listed in the Sponsored Link example above, FinallyFast.us also has been a regular Google advertiser and has had similar advertisements displayed following searches for "FinallyFast," "FinallyFast.com," and "www.FinallyFast.com." (Schran Decl., ¶¶ 19-20; Arena Decl, Ex. 13).

Google based upon the number of consumers that confusingly click on Google's Sponsored Links. (Schran Decl., ¶18). If more of Ascentive's prospective customers are diverted into selecting Google's Sponsored Links, Google reaps more profits. (*Id.*) Google generates approximately 97 percent of its $22 billion in annual revenues from its advertising programs. (Arena Decl., Ex. 2).

While Google profits from the confusion of Ascentive's prospective customers, Google's mislabeling exposes consumers to the risk of unknown software and harmful computer viruses. Indeed, Google itself has identified FinallyFast.us as distributing computer viruses harmful to internet users. (Arena Decl., Ex. 3). Additionally, Ascentive is irreparably harmed as a result of its prospective consumers' inability to locate its products. Despite Ascentive's investment in its software products, its advertising, and its FinallyFast brand name, its customers are unable to locate its products and are likely to believe, even after downloading or buying software from websites like FinallyFast.us, that the harmful software they downloaded is affiliated with Ascentive.

As described in more detail below, Ascentive brings this request for preliminary relief based on Google's continuing refusals to cease: (1) displaying Ascentive's trademarks in the text of Ascentive's competitors' advertisements; (2) encouraging Ascentive's competitors to target their ads to consumers seeking Ascentive's products with ad-triggering "keywords" that use Ascentive's trademarks; and (3) refusing to display Ascentive's advertisements and websites along with those of Ascentive's competitors.

FACTS

A. GOOGLE'S REFUSAL TO CEASE DISPLAYING ASCENTIVE'S TRADEMARKS IN THE TEXT OF GOOGLE ADVERTISEMENTS FOR ASCENTIVE'S COMPETITORS.

Google's trademark policies are posted online and incorporated into Google's contract with the advertisers participating in Google's "AdWords" advertising program, which includes any advertiser appearing in Google's Sponsored Links. (Arena Decl., Ex. 4). Google's trademark policy states:

> When we receive a complaint from a trademark owner...we only investigate the use of the trademark in ad text...if our investigation finds that the advertiser is using the trademark in the ad text in a manner which is competitive, critical, or negative, we will require the advertiser to remove the trademark and prevent them from using it in similar ad text in the future.

(Arena Decl., Ex. 4).

Pursuant to this policy, Ascentive submitted numerous trademark complaints and evidence of its trademark registrations to Google. (Schran Decl., Ex. A-E). Google, however, failed to investigate these uses of Ascentive's trademarks or to remove Ascentive's trademarks and variations of those trademarks from Google ad text. For example, on or before December 8, 2008, Ascentive submitted evidence of its registration for "FinallyFast.com" in the United States Patent and Trademark Office. (Schran Decl., Ex. B). Ascentive also asked for the variations "Finally Fast Com" and "Finally Fast.com" to be removed from ad text. (*Id.*) On March 2, 2009, Ascentive submitted a complaint regarding the following advertisement, which was triggered by searches for Ascentive's "FinallyFast" and "FinallyFast.com" trademarks:

> Finally **Fast** – Seen on TV
> Fix Annoying PC Errors Quickly!
> Get a **Fast** Pc in 3 min - Free Trial
> www.Finally**Fast**Again.com

(Schran Decl., ¶ 27, Ex. D). The website FinallyFastAgain.com was not in any way sponsored by or affiliated with Ascentive. (Schran Decl., ¶ 28).

Google responded: "[W]e will not be able to investigate 'finally fast' at this time because this mark differs too greatly from your actual trademark" and refused to remove Ascentive's trademark from the advertisement above and from any other Google advertisements. (Schran Decl., Ex. D) Even after Ascentive filed its complaint in this matter, Google continued to run the following advertisements:

Finally Fast Com
Search for **Finally Fast** Com
Find **Finally fast** com
www.Ask.com

Finallyfast Com
All About **Finallyfast** Com
Finallyfast Com in One Site!
Peeplo.com/**Finallyfast**+Com

Www **Finally Fast** Com
Get Www **Finally Fast** Com
Search for Www **Finally Fast** Com
www.Ask.com

(*See* July 1, 2009 Search Results, Arena Decl., Ex. 5). The advertisements above appeared despite Google's assurance on December 15, 2008, that Google's ad text "no longer includes your trademark: "Finally Fast Com." (Schran Decl., Ex. B).

Likewise, Ascentive submitted evidence of its trademark registration for "PC Speedscan" to Google on January 15, 2009. (Schran Decl., Ex. E). To date, Sponsored Links containing "PC Speedscan" in the ad text are still appearing. (Arena Decl., Ex. 6).

B. GOOGLE'S REFUSAL TO CEASE SELLING ASCENTIVE'S REGISTERED TRADEMARKS TO ASCENTIVE'S COMPETITORS AS KEYWORDS.

Google's "keyword" advertising system functions so that when an internet user searches for a term or keyword such as "FinallyFast," advertisers that have bought that keyword from Google will appear in the Sponsored Links, even if they are advertising confusingly similar products with confusingly similar advertisements. (Schran Decl., ¶¶ 17-21). As described above, customers are directed to the third-party advertisers' websites when they click on these Sponsored Links. (Schran Decl., ¶ 17).

Google openly refuses to curtail advertisers' use of proprietary trademarks as keywords (*see* Arena Decl., Ex. 4), and in fact encourages advertisers to select proprietary trademarks through its "Keyword Tool," which supplies advertisers with suggested keywords for any word they enter. (*See* http://adwords.google.com/select/KeywordToolExternal; Arena Decl., Ex. 7). For example, an advertiser looking to market software similar to Ascentive's might type "FAST PC" into Google's Keyword Tool, and Google then suggests keywords such as "FINALLY FAST PC" to the advertiser, incorporating Ascentive's trademark. (*Id.*) Google further informs the advertiser that a keyword like "FinallyFast," which generates approximately 110,000 searches per month, is more profitable than a keyword like "FastPC," which generates about 1,300 searches per month. (*Id.*) The advertiser's selection of "FinallyFast" over "FastPC" results in increased profits for Google and the advertiser, because it results in more consumer traffic to the competitor's website. (*Id.*; Schran Decl., ¶ 18). The advertiser selling software similar to Ascentive's is now assured that consumers searching on Google for "FinallyFast," will view its potentially confusing advertisement for a similar product.

Google's keyword advertising system has facilitated and encouraged trademark infringement by allowing website owners all over the world to copy the advertisements of proprietary trademark owners in the United States and to target the same demographic with confusing advertisements. This is evident from the website www.competitionequalizer.com, which offers software that not only analyzes keywords but allows Google advertisers to:

> -Gain quick access to United States, Canada and UK Google ad campaigns from anywhere in the world!
> -Reveal all your competitions['] ads in one place so you can export them, swipe the best parts, and create the ultimate ad that out-pulls your competitors day-in and day-out...This will dramatically increase your clickthrough rates!

(Arena Decl., Ex. 9). Google provides any website owner with all the tools they need to "swipe the best parts" of their competitors' ads, including their competitors' proprietary trademarks. As a result, over a hundred website owners all over the world (like the owner of FinallyFast.us, who claims to be located in India) have bid on Ascentive's proprietary marks and used these marks in their advertisements. (Schran Decl., ¶ 21; Arena Decl., Ex. 13).

C. GOOGLE BREACHES ITS CONTRACT WITH ASCENTIVE BY BANNING ASCENTIVE WITHOUT JUSTIFICATION OR EXPLANATION.

Ascentive began participating in Google's AdWords advertising program in 2003, and participated continuously in the program until February 27, 2009. As Ascentive generates approximately 99 percent of its revenues from online software sales, (*see* Schran Decl., ¶ 9), Ascentive's investment in online advertising is significant. Ascentive paid Google more than $645,000.00 to participate in Google's AdWords program in 2008. (*Id.* at ¶ 12).

With the launch of products such as its FinallyFast software in 2008, Ascentive began aggressively combating its competitors' use of its trademarks on Google, to protect Ascentive's revenues, intellectual property, reputation and online image. (Schran Decl., ¶¶ 23, 30-33). Ascentive not only began submitting numerous trademark complaints to Google in an attempt to protect its proprietary marks, between 2008 and 2009, Google contacted a significant number of third-party advertisers using its trademarks as keywords on Google. (*Id.*). A significant number of infringing Sponsored Links were removed as a result, decreasing Google's profits but increasing Ascentive's revenues and web traffic. (*Id.*)

This increased web traffic to Ascentive's websites continued until Google suddenly and without identifying any reason suspended Ascentive's AdWords account on February 27, 2009, and refused to run any advertisements paid for by Ascentive. (Schran Decl., ¶ 36). Then, on

March 4, 2009, Google ceased including some of Ascentive's websites, like FinallyFast.com, in Google's natural search listings. (*Id.* at ¶ 37).

Despite Ascentive's repeated attempts to be "relisted" by Google, Google did not provide Ascentive with an explanation for the ban of its websites. (*Id.* at ¶¶ 46-47). Ascentive speculated that Google may have suspended its account due to a dispute with a third party - the operators of the website StopBadware.org - regarding the features of one of Ascentive's software programs and allegations that Ascentive's software programs constituted malware.[3] (*Id.* at ¶ 44). Between March and May 2009, Ascentive communicated with and successfully resolved the dispute with StopBadware.org. The result was that Ascentive made alterations to its software and its software was removed from the StopBadware.org website. Despite these developments, however, Google refused to revoke the suspension. (*Id.*)

Google stated only that under its AdWords contract with Ascentive, it could terminate Ascentive's advertisements "for any reason." (Arena Decl., Ex. 8). This is simply not the case. Instead, the contract provides that an AdWords account could be terminated if a customer engaged in a "Prohibited Use," which was defined in the contract. (Arena Decl., Ex. 4, 8). At no time did Ascentive engage in a Prohibited Use, as defined by the contract. (*Id.*) Google not only refused to run Ascentive's current ads, Google refused to accept any ad from Ascentive, from any account, at any future time. (*Id.*)

D. ASCENTIVE IS SUFFERING IRREPARABLE HARM AS A RESULT OF GOOGLE'S WRONGFUL CONDUCT.

As Ascentive is a company that generates 99 percent of its revenues from online software sales, Google's deceptive search results have had a drastic impact on its ability to do business. (Schran Decl., ¶ 9). More than 78 percent of internet users searching for Ascentive's products by

[3] Malware is malicious software harmful to personal computers. At no time did any software product of Ascentive's constitute "malware."

brand name search for these products through Google and view the search listings and advertisements Google displays in response to their search queries. (Arena Decl., Ex. 2). Some of these prospective customers may view Google's search results even when they attempt to visit Ascentive's websites directly, by typing a website address such as "www.finallyfast.com" into their internet browser. (Schran Decl., ¶ 16). Customers' internet browsers can be designed to display Google results to the customer instead of taking them directly to Ascentive's website, despite their desire to go directly to Ascentive's website. (*Id.*)

As a result of Google's ban of Ascentive's websites, Ascentive has suffered a severe drop in online sales, and the number of visitors to Ascentive's website www.finallyfast.com, for example, dropped from approximately 1.9 million visitors per month in January, 2009, to approximately 500,000 visitors per month currently. (Schran Decl., ¶ 38). Ascentive relies on website traffic to generate sales; its FinallyFast software, for example, offers consumers a free scan and then will perform additional functions for $29.95, if the consumer selects this option. (Schran Decl., ¶ 8).

Ascentive's records of its website visitor traffic show that Ascentive suffered an immediate loss of ten percent of its recorded internet traffic and referral traffic following Google's ban of Ascentive's websites from Google's natural search listings and Google's advertising programs. (*Id.* at ¶¶ 39-40) Prospective customers' ability to find Ascentive's websites was so impaired that many of Ascentive's marketing efforts became uneconomical. (*Id.*) Even customers searching online and intending to buy Ascentive's products in response to Ascentive's marketing efforts could not locate Ascentive's products, and Ascentive was forced to cease some of its advertising as a result, causing a further drop in traffic beyond the initial ten percent drop and causing a further loss of profits to Ascentive. (*Id.*)

Similar numbers of consumers are still searching for "www.finallyfast.com" on Google, (*see* Arena Decl., Ex. 10); however, they are still *not finding* www.finallyfast.com through Google. (Schran Decl., ¶ 38). Of course, traffic to FinallyFast.us has increased, and surveys of consumer traffic to FinallyFast.us show that most consumers reach FinallyFast.us after searching for the following keywords:

"FINALLY FAST" (40.84 percent of search traffic)
"FINALLYFAST.COM" (14.75 percent of search traffic)
"WWW.FINALLYFAST.COM" (10.78 percent of search traffic)
"FINALLY FAST.COM" (9.87 percent of search traffic)

(Arena Decl., Ex. 11). Commentators discussing this lawsuit were not even sure whether the website FinallyFast.us was affiliated with Ascentive. (Arena Decl., Ex. 12).

ARGUMENT

In considering Ascentive's motion for preliminary relief, the Court is required to examine: (1) whether the moving party has a reasonable likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm absent the relief requested; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether the public interest favors relief. *See, e.g., Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004); *Am. Greeting Corp. v. Dan-Dee Imports, Inc.*, 807 F.2d 1136, 1140 (3d Cir. 1986). As discussed below, Ascentive satisfies all four requirements to obtain a preliminary injunction.

A. ASCENTIVE IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS.

1. Google's Willfully Misleading Search Results and Misuse of Ascentive's Trademarks Are Likely to Confuse Consumers.

Google's unauthorized and unlawful use of Ascentive's trademarks and Google's misleading search results constitute trademark infringement, unfair competition, and false designation of origin under the Lanham Act—specifically, 15 U.S.C. § 1125(a) and § 1114.[4] To prevail on a claim under the Lanham Act, the owner of a valid and legally protectable trademark, such as Ascentive, must show that the defendant uses a similar mark in commerce,[5] and this use "causes a likelihood of confusion." *Kos Pharm.*, 369 F.3d at 709 (citation omitted).

Likelihood of confusion exists where "consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark." *Checkpoint Sys., Inc., v. Check Point Software Techs., Inc.*, 269 F.3d 270, 280 (3d Cir. 2001) (citations omitted). "Proof of actual confusion is not necessary; likelihood is all that need be shown." *Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 195 (3d Cir. 1990).

In determining whether there is a likelihood of confusion, the Third Circuit applies the following ten-part analysis known as the Lapp factors:

> (1) similarity of the marks;
> (2) the strength of the owner's mark;
> (3) the price of the goods and other factors indicative of the care and attention expect of consumers when making a purchase;
> (4) the length of time the defendant has used the mark without evidence of actual confusion;
> (5) the intent of the defendant in adopting the mark;

---

[4] Ascentive asserts claims of trademark infringement, unfair competition and false designation of origin under 15 U.S.C. § 1114 and 15 U.S.C. § 1125(a), as well as common law trademark infringement, unfair competition and false designation of origin claims. The test for Ascentive's common law claims is the same as the test for infringement and unfair competition under the Lanham Act. *See, e.g., Standard Terry Mills, Inc. v. Shen Mfg. Co.*, 803 F.2d 778, 780, n.4 (3d Cir. 1986). Furthermore, Lanham Act claims under 15 U.S.C. § 1114 and 15 U.S.C. § 1125(a) are measured by identical standards. *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000).

[5] Google uses Ascentive's trademarks in the text of its advertisements and as keywords that trigger its advertisements. Given the authority holding that this conduct constitutes "use" under the Lanham Act, and the lack of authority to the contrary in this Circuit, this point is not discussed at length here. *See, e.g., RescueCom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009); *GEICO v. Google, Inc.*, No. 1:04cv507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005).

(6) the evidence of actual confusion;
(7) whether the goods are marketed or advertised through the same channels;
(8) the extent to which the targets of the parties' sales efforts are the same;
(9) the relationship of the goods in the minds of consumers; and
(10) other factors suggesting that the consuming public might expect the prior owner to manufacture both products, or manufacture a product in the defendant's market, or expect that the prior owner is likely to expand into the defendant's market.

Interpace Corp. v. Lapp, 721 F.2d 460, 463 (3d Cir. 1983).

Google's search results for Ascentive's FinallyFast.com registered trademark alone exemplify the likelihood of confusion in this matter. It is apparent that:

(1) Google displays identical and confusingly similar marks to Ascentive's in the text of its advertisements (*see* Section B below);
(2) Ascentive owns well-known, strong, and registered trademarks, as indicated by the fact that its competitors use its marks in ad text and as keywords (*see* Sections B and C below);
(3) Ascentive and its competitors' software retails for approximately $29.95 or less, and can be downloaded with a couple clicks of the mouse, so customers are unlikely to exercise great care and attention in making a purchase (*see* Schran Decl., ¶__);
(4) New Google ads appear on a daily basis, and there is evidence that these ads create customer confusion (*see* Sections A-D below);
(5) Google continues to adopt Ascentive's marks with clear intent to do so, despite numerous trademark complaints from Ascentive (*see* Section B below);
(6) Evidence shows that a consistent number of consumers have searched for Ascentive's products on Google's search engine during the last year; due to Google's conduct, however, consistent numbers of consumers are not locating Ascentive's products (*see* Section A below);
(7) Google's use of keywords ensures that Ascentive's and its competitors' goods are marketed through the same channels (*see* Section C below);
(8) Google's use of keywords ensures that Ascentive's and its competitors' goods reach the same target consumers (*see* Section C below);
(9) The software products advertised are highly related in the minds of consumers (*see* Sections A-D below); and
(10) As demonstrated by Google's search results, consumers are likely to expect Ascentive's competitors to offer Ascentive's software based on Google's conduct (*see* Sections A-D below).

(a) The Evidence Demonstrates Consumer Confusion in the Form of Diverted Internet Traffic.

The United States Court of Appeals for the Third Circuit has recognized that likelihood of confusion can be established by a showing of "initial interest confusion." *Checkpoint Sys.*, 269 F.3d at 292. Initial interest confusion occurs where the use of a similar mark could lead a potential purchaser to consider a competitor's products as well as the products of the trademark owner. *Id.* The Lanham Act forbids a competitor from "luring potential customers away from a producer by initially passing off its goods as those of the producer's even if confusion as to the source of the goods is dispelled by the time any sales are consummated." *Id.* at 294. Courts have found that damages to a trademark holder result even where a consumer eventually becomes aware of the source's actual identity or where no sale occurs. *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273, 290 (D.N.J. 2006).

In the internet context, evidence of initial interest confusion exists where there is evidence of "the unauthorized use of trademarks to divert internet traffic, thereby capitalizing on a trademark holder's goodwill." *GoTo.com, Inc.*, 437 F.Supp.2d at 290 (*quoting Australian Gold, Inc., v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006)). A diversion of internet traffic from the trademark holder's website to those of its competitors is a significant factor. *Id.* Where the trademark owner presents statistical evidence of customer diversion, confusion is likely. *Id.* at 292.

Evidence of diverted internet traffic is apparent in this matter because during the last twelve months, a consistent number of consumers have searched for trademarks like "FinallyFast.com." (Arena Decl., Ex. 10). Google recently estimated this traffic at 110,000 searches per month. (Arena Decl., Ex. 7). These consumers, however, are not visiting Ascentive's FinallyFast.com website. (Schran Decl., ¶ 38). Visitor traffic to FinallyFast.com increased as Ascentive caused infringing Sponsored Links to be removed by contacting third-party advertisers between 2008 and 2009. (*Id.* at ¶¶ 33-35). This increase occurred until Google banned Ascentive's websites on February 27, 2009, after which visitor traffic plummeted. (*Id.* at ¶ 36). The decrease of monthly visitors from 1.9 million to 500,000 is strong evidence of customer confusion. (*Id.* at ¶ 38). *See GoTo.com*, 437 F.Supp.2d at 290 ("evidence of the diversion of traffic away from [the plaintiff's] website to those of its competitors is also a significant factor.") Furthermore, the fact that FinallyFast.us experiences ***most*** of its internet traffic from its use of Google's keywords "FinallyFast," "FinallyFast.com," and "www.finallyfast.com," demonstrates the diversion of internet traffic from Ascentive to its competitors. (Arena Decl., Ex. 11). (*See also* Arena Decl., Ex. 12 (expressing confusion over whether FinallyFast.us was affiliated with Ascentive)).

(b) Despite Holdings that Google's Use of Trademarks in Ad Text Causes Customer Confusion, Google Continues to Include Ascentive's Trademarks in Ad Text in Breach of its Own Policies and Contract.

Google's trademark policies state that it will investigate the use of proprietary marks in ad text and remove infringements. (Arena Decl., Ex. 4). Courts already have held that this use of proprietary trademarks causes customer confusion; Google, however, has failed to abide by its own policies. In *GEICO v. Google, Inc.*, No. 1:04cv507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005), the court held that GEICO established that Google's use of GEICO's trademarks in the headings and text of Google's Sponsored Links caused a likelihood of confusion and violated the Lanham Act. The Court stated:

> …[T]he survey's results were sufficient to establish a likelihood of confusion regarding those Sponsored Links in which the trademark GEICO appears either in the heading or text of the ad. Based on this finding, Google may be liable for trademark infringement for the time period before it began blocking such usage or for such ads that have slipped or continue to slip through Google's system for blocking the appearance of GEICO's mark in Sponsored Links. For, despite the flaws in the survey, the extremely high percentages of respondents who experienced some degree of confusion when viewing such ads provides sufficient evidence…

Id. at *7. *See also Edina Realty, Inc. v TheMLSOnline.com*, No. 04cv4371, 2006 WL 737064 (D. Minn. Mar. 20, 2006) (ultimately denying summary judgment due to factual issues, but holding that use of identical mark in Sponsored Link text, along with use as a keyword, "increases the likelihood of confusion").

Google's continued use of Ascentive's exact trademarks in its ad text, even after it assured Ascentive that it would remove registered trademarks like "Finally Fast Com" from the text of its advertisements, constitutes clear infringement. *See Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 195 (3d Cir. 1990) ("Very little analysis is needed in the present case...there is a great likelihood of confusion when an infringer uses the exact trademark.") (*quoting United States Jaycees v. Philadelphia Jaycees,* 639 F.2d 134, 142(3d Cir. 1981)). "[L]ikelihood of confusion is inevitable, when...the identical mark is used concurrently by unrelated entities." *Id. See also Insurance Corp. v. Lapp, Inc., 721 F.2d* 460, 462 (3d Cir.1983) (where the owner of the trademark and the infringer "deal in competing goods or services, the court need rarely look beyond the mark itself. In those cases the court will generally examine the registered mark...and compare it against the challenged mark.")

Google still refuses to remove Ascentive's trademarks and confusingly similar terms from its Sponsored Links, as seen for example in the current Finally-Fast-PC.com ad pictured above. (*See also* Arena Decl., Ex. 1, 7, 8). Google is obligated to investigate and remove the use of not only exact trademarks in ad text, but confusingly similar variations of those trademarks. "If the overall impression created by marks is essentially the same, it is very probable that the marks are confusingly similar." *Opticians Assoc*, 920 F.2d at 195. Google's refusal to remove marks like "FinallyFast" when presented with Ascentive's trademark registration for "FinallyFast.com" violates the Lanham Act and causes consumer confusion.

(c) Courts Already Have Held that the Use of Trademarks as Keywords Causes a Likelihood of Confusion, But Google Continues to Encourage its Advertisers to Use Ascentive's Trademarks as Keywords.

The Second Circuit recently held that Google's use of proprietary marks as keywords constitutes "use" under the Lanham Act, and remanded the matter to determine whether the use causes a likelihood of customer confusion. *See Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129 (2d Cir. 2009). In doing so, the court recognized that Google not only displays, offers and sells trademarks to its advertisers, but that it "encourages the purchase of [the plaintiff's] mark through its Keyword Suggestion Tool." *Id.* at 129. *See also 800-JR Cigar, Inc., v. GoTo.com*, 437 F.Supp.2d 273, 285 (D.N.J. 2006) (finding that search engine identifies trademarks that are effective search terms and "markets them" to the trademark owners' competitors). The Second Circuit also rejected Google's argument that its use of keywords was simply "product placement" used to benefit consumers. The court stated:

> Google's argument misses the point. From the fact that proper, non-deceptive product placement does not result in liability under the Lanham Act, it does not follow that the label "product placement" is a magic shield against liability, so that even a deceptive plan of product placement designed to confuse consumers would similarly escape liability...The practices attributed to Google by the Complaint, which at this stage we must accept as true, are significantly different from benign product placement that does not violate the Act.

Rescuecom, 562 F.3d at 130.

Other courts have reached the issue of whether the use of proprietary marks as keywords by a competitor creates a likelihood of confusion, and have held that it does. In *Finance Express, LLC, v. Nowcom Corp.*, 564 F.Supp.2d 1160 (C.D. Cal. 2008), the court issued a preliminary injunction to enjoin one software company from buying the trademarked keywords of another software company on Google and other search engines, holding that "the practice of keying may initially confuse customers into clicking on Nowcom's banner advertisement. Once the consumer arrives at Nowcom's site, he may realize he is not at a Finance Express-sponsored site. However, he may be content to remain on Nowcom's site, allowing Nowcom to misappropriate Finance Express' goodwill. Such use is actionable." *Id. (citing Playboy Enters. v. Welles*, 7 F.Supp.2d 1098 (S.D.Cal. 1998)). *See also Australian Gold, Inc., v. Hatfield*, 436 F.3d 1228, 1239 (10th Cir. 2006) ("Defendants paid [an internet retailer] to list Defendants in a preferred position whenever a computer user searched for Plaintiffs' trademarks...Defendants used the goodwill associated with Plaintiffs' trademarks in such a way that consumers might be lured to...Plaintiffs' competitors. This is a violation of the Lanham Act."); *Soilworks, LLC, v. Midwest Industrial Supply, Inc.*, 575 F.Supp.2d 1118, 1132 (D. Ariz. 2008) ("the undisputed evidence in this case establishes that [the defendant] diverts the initial attention of potential Internet customers to its websites by using [the plaintiff's] trademark in keywords and metatags.")

Consumers typing "www.finallyfast.com" into Google's search engine are presumably looking to visit Ascentive's www.finallyfast.com, and locate the software products it offers. Yet, Google directs them to the websites of Ascentive's competitors. *Soilworks, LLC*, 575 F.Supp. at 1132 ("A person typing 'soil sement' into a search engine presumably would be somewhat familiar with [the plaintiff's Soil Sement] product and would be looking for the product or its maker, and yet would be directed by the keywords and metatags to [defendants'] websites.") Google has no incentive to lead consumers directly to www.finallyfast.com because it profits from selling "www.finallyfast.com" to Ascentive's competitors as a keyword. *See GoTo.com*, 437 F.Supp.2d at 285 ("by ranking its paid advertisers before any 'natural' listings in a search results list, GoTo has injected itself into the marketplace, acting as a conduit to steer potential customers away from [the plaintiff] to [the plaintiff's] competitors. Presumably, the more money advertisers bid and the more frequently advertisers include [the plaintiff's] trademarks among their selected search terms, the more advertising income GoTo is likely to gain.")

Google also profits from confusing customers into thinking its Sponsored Links are the most relevant results, and enticing customers to click on its paid advertisements. *Rescuecom*, 562 F.3d at 131 (describing concern that consumers will view Google's highlighted Sponsored Link advertisements as the most relevant search results instead of as advertisements). Google markets Ascentive's trademarks to any individual or business, located anywhere in the world, that pays the minimal fee needed to register a website. (Schran Decl., ¶¶ 31-32; Arena Decl., Ex. 7). Google's adopted trademark policy then puts the burden on trademark owners like Ascentive to police the use of their trademarks by these individuals and businesses around the world, while disclaiming liability for advertisements Google profits from and enables. (Arena Decl., Ex. 4). As shown in the search results for "www.finallyfast.com," Google's use of the keyword "www.finallyfast.com" does not represent benign product placement, but a deceptive marketing plan that causes customer confusion and permits Google to profit from Ascentive's registered trademark. (Arena Decl., Ex. 1, 7).

(d) Courts Have Broadly Defined Unfair Competition and False Designation of Origin to Include Google's Deceptive Ban of Ascentive, But Google Continues Its Unjustified Ban of Ascentive.

Google's display of Ascentive's competitors' advertisements, while refusing to include Ascentive's websites in its Sponsored Links and search listings, also constitutes unfair competition and false designation of origin under the Lanham Act. Section 43(a) of the Lanham Act broadly defines these claims to include:

> [a]ny person who, on or in connection with any goods or services...uses in commerce any word, term, name, symbol or device ... or any false designation of origin or misleading representation of fact which ... is likely to deceive as to the affiliation, connection or association of such person with another person, or as to origin, sponsorship or approval of his

> or her goods, services, or commercial activities by another person … shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

By containing such broad language, the Act "proscribes not only trademark infringement in its narrow sense, but more generally creates a federal cause of action for unfair competition." *American Telephone and Telegraph Company v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1428 (3d Cir. 1994). The elements of the claim are that: (1) Google uses a false designation of origin, as defined in the Act; (2) such use of a false designation occurs in interstate commerce in connection with goods and services; (3) such false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship, or approval of Google's goods or services by another person; and (4) Ascentive has been or is likely to be damaged as a result. *Id.*

The same Google search-and-advertise scheme that confuses prospective customers with Sponsored Links like the one for Finally-Fast-PC.com, further confuses customers seeking FinallyFast.com software by implementing a device that blocks FinallyFast.com and Ascentive's advertisements from appearing in Google's "natural" search results. Section 43(a) is broad enough to encompass any "false" designation of origin, including not only the disclosure of false information, but the failure to disclose a material fact that tends to falsely describe or represent the goods in question. *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 11 (E.D.Pa. 1974). *See also Frisch's Restaurants, Inc., v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642 (6th Cir. 1982) (holding district court properly required party to disclose information to the public to correct false impressions generated by advertisements under Section 43(a)); *U-Haul Intern., Inc., v. Jartran, Inc.*, 522 F.Supp. 1238, 1247 (D.C. Ariz. 1981) ("A statement actionable under the Lanham Act may be an affirmatively misleading statement, a partially incorrect statement, or a statement which is untrue as a result of failure to disclose a material fact."); *P. Lorillard Co. v. FTC,* 186 F.2d 52, 58 (4th Cir. 1951) ("The fault with this advertising was…that it did not print all that the Reader's Digest article said, but that it printed a small part thereof in such a way as to create an entirely false and misleading impression.")

Google's failure to include any of Ascentive's websites in the natural search results for "www.finallyfast.com," including its refusal to allow Ascentive to run any advertisements for FinallyFast.com, violates the Lanham Act. Google has previously argued that its advertising scheme does not mislabel products, but that Google is akin to a retailer placing similar products on the same shelf in a retail store. If that were true, then Google would have no reason to ban Ascentive from placing its products beside its competitors. Google's failure to do so causes customer confusion and falsely tends to describe the brand name goods in question. As the Second Circuit remarked in *Rescuecom*, Google's "product placement" argument fails and is not a shield against liability for a deceptive plan of product placement. Google's ban of Ascentive is part of its overall deceptive marketing plan, which like Google's use of trademarks in keywords and ad text, causes customer confusion.

2. Google's Intentional Interference with Ascentive's Prospective Contractual Relationships and Breach of its Contract with Ascentive.

Ascentive also is likely to succeed on its claim that Google breached its contract with Ascentive and intentionally interfered with Ascentive's prospective contractual relations. As a paying AdWords customer from 2003 to 2009, Ascentive contracted with Google as a Google advertiser and paid Google more than $645,000 last year. (Schran Decl., ¶¶ 11-12). As described above, Google breached the terms of its contract with Ascentive by: (1) refusing to protect Ascentive's trademarks from online infringement or to investigate trademark infringement, even where Google agreed under its own trademark policies to do so; (2)

permanently suspending Ascentive's account and refusing to accept any advertisements from Ascentive in the future; and (3) refusing to include websites of Ascentive's in its search listings.

Google's conduct and the inability of prospective customers to locate Ascentive's websites also supports Ascentive's claim for intentional interference. The elements of a cause of action for intentional interference with contractual relations under Pennsylvania law are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct." *The York Group, Inc., v. Yorktowne Caskets*, Inc., 924 A.2d 1234, 1245 (Pa. Super. 2007) (granting preliminary injunction based on evidence of breach of contract and intentional interference).

Although Google has yet to provide Ascentive with an explanation for its ban of Ascentive from its advertising programs and websites, Google does have an incentive to ban Ascentive and any other trademark holder submitting numerous trademark complaints and attempting to curtail the use of trademarks in Google's Sponsored Links. Moreover, despite repeated complaints by Ascentive, Google persisted in its wrongful conduct. As such, Ascentive has a likelihood of showing that Google's ban was intentional and specifically intended to harm Ascentive's ability to sell its trademarked products to its prospective customers. Google acted without privilege or justification and Ascentive was harmed as a result.

B. ASCENTIVE IS SUFFERING IRREPARABLE HARM.

In a trademark infringement case, the irreparable harm inquiry focuses on the harm to the reputation of the trademark and harm to the trademark's ability to function as a source identifier that results from confusion among consumers. *See S&R Corp. v. Jiffy Lube Int'l,* 968 F.2d 371, 378 (3d Cir. 1992) ("Because we have concluded that [plaintiff] is likely to prove at trial that [defendant] is infringing its trademark, we find that [plaintiff] has *a fortiori* alleged irreparable injury"); *Vuitton v. White,* 945 F.2d 569, 576 (3d Cir. 1991) ("Both potential damage to reputation and likelihood of confusion constitute irreparable injury."); *Times Mirror Magazines, Inc. v. Las Vegas Sports News, LLC,* 212 F.3d 157, 169 (3d Cir. 2000) (holding that potential damage to reputation or goodwill or likely confusion between the parties' marks is irreparable injury).

Moreover, in the context of a motion for a preliminary injunction in a trademark infringement case, it is well established that if a plaintiff establishes a likelihood of success on the merits of its trademark claims, there is *a presumption* of irreparable harm. *See Opticians Assoc.,* 920 F.2d at 196-97 (once a showing of likely confusion is made, the "inescapable conclusion is that there was also irreparable injury"); *S&R Corp.,* 968 F.2d at 378 (trademark violations and likelihood of confusion "amount[] to irreparable injury as a matter of law"); *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.,* 982 F.2d 633, 640 (1st Cir. 1992) ("By its very nature, trademark infringement results in irreparable harm because the attendant loss of profits, goodwill, and reputation cannot be satisfactorily quantified ...Hence, irreparable harm flows from an unlawful trademark infringement as a matter of law.")

An award of money damages cannot cure the harm to Ascentive's reputation and business in this case. Ascentive has a valid concern that websites like Finally-Fast-PC.com and FinallyFast.us will tarnish its reputation if Google's use of Ascentive's trademarks is allowed to continue. (Arena Decl., Ex. 1, 3). Ascentive suffers not only from a loss of revenues due to Google's conduct, but the inability to protect its goodwill and reputation online due to the actions of Google and its third-party advertisers.

C. THE PUBLIC INTEREST AND BALANCE OF HARDSHIPS STRONGLY FAVOR AN INJUNCTION.

As Ascentive has shown that there is a likelihood that customers will be confused by Google's deceptive advertising scheme, it follows that the public interest favors an injunction. "Public interest can be defined in a number of ways, but in a trademark case, it is most often a synonym for the right of the public not to be deceived or confused." *Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 197-98 (3d Cir. 1990). "Having already established that there is a likelihood of consumer confusion created by the concurrent use…it follows that if such use continues, the public interest would be damaged." *Id. See also SK&F, Co. v. Premo Pharm. Laboratories,* 625 F.2d 1055, 1057 (3d Cir. 1980) ("preventing deception of the public is itself in the public interest"); *Board of Directors of Sapphire Bay Condominiums West v. Simpson,* No. 04-3690, 2005 WL 1006922, at *3 (3d Cir. May 2, 2005) (granting preliminary injunction served public interest by eliminating online customer confusion).

In addition, the harm to the public interest is particularly significant in this case because of the likelihood that a customer searching for Ascentive's FinallyFast software, for example, will unintentionally download harmful software such as the software Google identified as malicious at FinallyFast.us. (Arena Decl., Ex. 3). In evaluating, purchasing and downloading computer software products online, the public has a strong interest in being able to accurately identify the source of the software they are downloading and the individual or company to whom they are producing their credit card information. Google's conduct has done nothing to protect this important public interest.

Finally, the balance of the harms in this case strongly favors Ascentive. Ascentive is only one of Google's millions of advertisers, and accounts for an extremely small slice of

Google's $22 billion in annual advertising revenues. (Arena Decl., Ex. 2). Reversing the "permanent suspension" of Ascentive's advertising account will cause no harm to Google. On the other hand, as described above, Google's ban of Ascentive's websites and misleading search results have drastically reduced Ascentive's ability to protect its reputation, goodwill and brand names online.

CONCLUSION

For the foregoing reasons, plaintiff Ascentive, LLC, respectfully requests that this Court grant its motion for preliminary injunction and order that defendant Google, Inc., cease: (1) displaying Ascentive's trademarks in the text of its advertisements; (2) permitting and encouraging Ascentive's trademarks to be used as keywords; and (3) banning Ascentive and Ascentive's websites from its advertising programs and search listings.

Respectfully submitted,

Dated: July 24, 2009

Abbe F. Fletman (Pa. Bar No. 52896)
abbe.fletman@flastergreenberg.com
Jordan A. LaVine (Pa. Bar No. 78503)
jordan.lavine@flastergreenberg.com
Alexis Arena (Pa. Bar No. 200227)
alexis.arena@flastergreenberg.com
FLASTER/GREENBERG P.C.
1600 JFK Blvd., Suite 200
Philadelphia, PA 19103
(215) 279-9393 (phone)
(215) 279-9394 (fax)
Attorneys for plaintiff Ascentive, LLC